IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1930 OF 2005

IN

SUIT NO.1780 OF 2005

Sujata Niketan Co-op.Housing Society Ltd. ...Plaintiff.

vs.

Pawankumar Damodar Dhanuka. ...Defendant.

Mr.M.U.Pandey, for Plaintiff.

Mr.Yadav i/b. D.R.Shah, for Defendant.

CORAM: D.K.DESHMUKH,J.

DATED: 11th December,2006..

P.C.:-

1. This is a notice of motion filed by the plaintiff. The plaintiff has filed the suit for decree of possession of the land admeasuring 136 sq. meters as shown surrounded within blue colour boundary lines on the plan annexed to the plaint. According to the plaintiff, the

defendant was in possession of a structure that was a small bungalow as a tenant. Some portion of the bungalow was compulsorily acquired. Thereafter, the defendant encroached upon the adjoining open space and raised the construction. The plaintiff which is admittedly the owner of the land, has filed the suit for decree of possession. By this notice of motion, the plaintiff claims an order for appointment of receiver on the encroached portion. By order dated 18.7.2005 this Court has appointed a Commissioner to ascertain the encroachment committed by the defendant and directed him to submit report to the Court. Pursuant to the order dated 18.7.2005 the Commissioner has submitted report which is dated 23.7.2005. According to that report, when the Commissioner visited the spot, the defendant handed over to him a copy of a plan showing original structure. The Commissioner also drew a sketch which is at "Exhibit B" to the report, whereas copy of the plan showing structures handed over by the defendant to the Commissioner is marked at "Exhibit C" to the report. According to the report of the Commissioner, portion shown as "11" and "12" in the rough sketch at Exhibit B is the original structure which has mangalore tiles roof. The portions shown as "9" and "1" in the rough sketch are erected subsequently on the open portion and then existing garden. According to the Commissioner, in the plan at "Exhibit C" which is handed over by the defendant to the Commissioner this portion "9 and 1" is shown as open space and garden. Thus, it is clear from the report

of the Commissioner that on the basis of the map at Exhibit C which was handed over by the defendant to the Commissioner it is clear that the defendant has erected a structure on the portion which was shown as open in the map at Exhibit C. The Commissioner has further observed that the portion shown as "3B" in the rough sketch was also shown as open space on which new room with flat roof of girdles and coba ladhi is constructed. Portion shown as "4 and 5" in the rough sketch was open space as shown in the map at "Exhibit C" and now the defendants have converted portion "4" into a WC and bathroom and portion "5" as dressing room. Thus, as per the report of the Commissioner based on the map at "Exhibit C" which was handed over by the defendant so are the observations made by the Commissioner, the portion marked at "9", "1", "3B", "4" and "5" are the encroachments by the defendant on the land which was open. Though, these clear observations are made in the report of the Commissioner, the defendant has not filed any affidavit disputing the correctness of the observations made in the report of the Commissioner. The learned Counsel appearing for defendant submits that the observations that the portions "9", "1", "3B", "4" and "5" in the rough sketch are the encroachments, are not the observations of the Commissioner but are the statements made by the plaintiff. Perusal of the report itself shows that the submission has no substance. The Commissioner has clearly observed that these portions are the

encroachments made by the defendant. Though the defendant has filed reply after the Commissioner submitted his report, in the reply the defendant does not deal with the report of the Commissioner. It appears from the reply that the case of the defendant is that he has raised this construction as per the liberty granted by this Court. Perusal of the order passed by this Court which is referred to by the defendant shows that as a result of compulsory acquisition of portion of the structure occupied by the defendant, the Court had granted him liberty to raise construction. That liberty granted by this Court cannot be construed to mean that the defendant was granted licence by this Court to encroach upon the land belonging to the landlord and go on raising construction without consent of the landlord. What is pertinent to note is that in both the petitions that have been filed by the defendant in this court, the landlord was not joined as a party

2. Taking overall view of the matter therefore, and looking to the attitude of the defendant of encroaching the open land belonging to the landlord, in my opinion, it would be appropriate to appoint Receiver on the encroached portion, as also to restrain the defendant from making any further encroachment.

3. The notice of motion is therefore, granted in terms of prayer clause (b). Receiver of this Court is appointed as Receiver of the

portions marked as “9”, “1”, “3B”, “4” and “5” in the rough sketch at “Exhibit B” to the report of the Commissioner dated 23.7.2005 on the record of this suit. The defendant is willing to act as agent of the receiver. Therefore, the Receiver shall not disturb the physical possession of the defendant and shall appoint the defendant as his agent to be in possession of the portions in relation to which the Receiver is being appointed on usual terms and conditions including royalty and security. The notice of motion is disposed of.

4. At the request of the learned Counsel appearing for defendant, the Receiver is directed to take possession after a period of four weeks from today.